

out under the TIA, including any sub-awards for substantive program performance, but it does not preclude participants' or subrecipients' payment of reasonable fee or profit when making purchases from suppliers of goods (*e.g.*, supplies and equipment) or services needed to carry out the research.

### **Subpart C—Expenditure-Based and Fixed-Support Technology Investment Agreements**

#### **§ 37.300 What is the difference between an expenditure-based and fixed-support TIA?**

The fundamental difference between an expenditure-based and fixed-support TIA is that:

(a) For an expenditure-based TIA, the amounts of interim payments or the total amount ultimately paid to the recipient are based on the amounts the recipient expends on project costs. If a recipient completes the project specified at the time of award before it expends all of the agreed-upon Federal funding and recipient cost sharing, the Federal Government may recover its share of the unexpended balance of funds or, by mutual agreement with the recipient, amend the agreement to expand the scope of the research project. An expenditure-based TIA therefore is analogous to a cost-type procurement contract or grant.

(b) For a fixed-support TIA, the amount of assistance established at the time of award is not meant to be adjusted later if the research project is carried out to completion. In that sense, a fixed-support TIA is somewhat analogous to a fixed-price procurement contract (although “price,” a concept appropriate to a procurement contract for buying a good or service, is not appropriate for a TIA or other assistance instrument for stimulation or support of a project).

#### **§ 37.305 When may I use a fixed-support TIA?**

You may use a fixed-support TIA if:

(a) The agreement is to support or stimulate research with outcomes that are well defined, observable, and verifiable;

(b) You can reasonably estimate the resources required to achieve those outcomes well enough to ensure the desired level of cost sharing (*see* example in § 37.560(b)); and

(c) Your TIA does not require a specific amount or percentage of recipient cost sharing. In cases where the agreement does require a specific amount or percentage of cost sharing, a fixed-support TIA is not practicable because the agreement has to specify cost principles or standards for costs that may be charged to the project; require the recipient to track the costs of the project; and provide access for audit to allow verification of the recipient's compliance with the mandatory cost sharing. You therefore must use an expenditure-based TIA if you:

- (1) Have a non-waivable requirement (*e.g.*, in statute) for a specific amount or percentage of recipient cost sharing; or
- (2) Have otherwise elected to include in the TIA a requirement for a specific amount or percentage of cost sharing.

#### **§ 37.310 When would I use an expenditure-based TIA?**

In general, you must use an expenditure-based TIA under conditions other than those described in § 37.305. Reasons for any exceptions to this general rule must be documented in the award file and must be consistent with the policy in § 37.230 that precludes payment of fee or profit to participants.

#### **§ 37.315 What are the advantages of using a fixed-support TIA?**

In situations where the use of fixed-support TIAs is permissible (*see* §§ 37.305 and 37.310), their use may encourage some commercial firms' participation in the research. With a fixed-support TIA, you can eliminate or reduce some post-award requirements that sometimes are cited as disincentives for those firms to participate. For example, a fixed-support TIA need not:

- (a) Specify minimum standards for the recipient's financial management system.
- (b) Specify cost principles or standards stating the types of costs the recipient may charge to the project.

(c) Provide for financial audits by Federal auditors or independent public accountants of the recipient's books and records.

(d) Set minimum standards for the recipient's purchasing system.

(e) Require the recipient to prepare financial reports for submission to the Federal Government.

### Subpart D—Competition Phase

#### § 37.400 Must I use competitive procedures to award TIAs?

DoD policy is to award TIAs using merit-based, competitive procedures, as described in 32 CFR 22.315:

(a) In every case where required by statute; and

(b) To the maximum extent practicable in all other cases.

#### § 37.405 What must my announcement or solicitation include?

Your announcement, to be considered as part of a competitive procedure, must include the basic information described in 32 CFR 22.315(a). Additional elements for you to consider in the case of a program that may use TIAs are described in §§ 37.410 through 37.420.

#### § 37.410 Should my announcement or solicitation state that TIAs may be awarded?

Yes, once you consider the factors described in subpart B of this part and decide that TIAs are among the types of instruments that you may award pursuant to a solicitation, it is important for you to state that fact in the solicitation. You also should state that TIAs are more flexible than traditional Government funding instruments and that provisions are negotiable in areas such as audits and intellectual property rights that may cause concern for commercial firms. Doing so should increase the likelihood that commercial firms will be willing to submit proposals.

#### § 37.415 Should I address cost sharing in the announcement or solicitation?

To help ensure a competitive process that is fair and equitable to all potential proposers, you should state clearly in the solicitation:

(a) That, to the maximum extent practicable, the non-Federal parties carrying out a research project under a TIA are to provide at least half of the costs of the project (see § 37.215(b)).

(b) The types of cost sharing that are acceptable;

(c) How any in-kind contributions will be valued, in accordance with §§ 37.530 through 37.555; and

(d) Whether you will give any consideration to alternative approaches a proposer may offer to demonstrate its strong commitment to and self-interest in the project's success, in accordance with § 37.215.

#### § 37.420 Should I tell proposers that we will not disclose information that they submit?

Your solicitation should tell potential proposers that:

(a) For all TIAs, information described in paragraph (b) of this section is exempt from disclosure requirements of the Freedom of Information Act (FOIA)(codified at 5 U.S.C. 552) for a period of five years after the date on which the DoD Component receives the information from them.

(b) As provided in 10 U.S.C. 2371, disclosure is not required, and may not be compelled, under FOIA during that period if:

(1) A proposer submits the information in a competitive or noncompetitive process that could result in their receiving a cooperative agreement for basic, applied, or advanced research under the authority of 10 U.S.C. 2358 or any other type of transaction authorized by 10 U.S.C. 2371 (as explained in appendix B to this part, that includes all TIAs); and

(2) The type of information is among the following types that are exempt:

(i) Proposals, proposal abstracts, and supporting documents; and

(ii) Business plans and technical information submitted on a confidential basis.

(c) If proposers desire to protect business plans and technical information for five years from FOIA disclosure requirements, they must mark them with a legend identifying them as documents submitted on a confidential